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June 2, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: March 26, 2004

Case No.: TIA-0068

XXXXXXX XXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant's late husband (hereinafter "the worker") was a DOE contractor employee at a DOE facility. Based on a negative determination concerning the worker from an independent Physician Panel (the Panel), the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be granted.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

1/ See www.eh.doe.gov/advocacy.

the employee, the DOE Office of Worker Advocacy accepts the determination and instructs the contractor not to oppose the claim unless required by law to do so. The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. See 10 C.F.R. Part 852. As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request that the DOE's Office of Hearings and Appeals (OHA) review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the Program Office. 10 C.F.R. § 852.18(a)(2). See *Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that for 33 years the worker was an employee at the DOE's facility in Oak Ridge, Tennessee, where he worked in the X-10, K-25 and Y-12 plants. She stated that he was exposed to chemicals, radiation and hazardous materials in the workplace. She further stated that after the worker's retirement in 1981, his health began to deteriorate and he was hospitalized on several occasions for breathing problems and unexplained illnesses. She stated that during his final illness and hospitalization, he spent six weeks on a ventilator, his lungs not functional, before his death in early January, 1989. In support of her application for DOE assistance, she submitted hospital records concerning the worker's treatment during his final hospitalizations and an analysis of those treatment records by a licensed physician in Tennessee (the applicant's physician). In a report dated July 19, 2002, the applicant's physician made the following findings:

I have been advised that the Department of Energy understands that [the worker] was exposed to beryllium over periods of time during his employment and it is well known that symptoms from beryllium toxicity may occur acutely or may not develop for decades after exposure, even though the exposure may have been brief.

It is my opinion that [the worker] probably breathed dust or fumes which contained beryllium during his work for the

Department of Energy. Unfortunately, during the time when he was exposed and following and during the time in the 1980s when he was becoming symptomatic of the disease, the beryllium pathologic process was not clearly understood by health care providers. A blood patch testing of the skin (BeLPT) was not performed. Because of his instability during the hospitalization of December of 1988, a bronchoscopy with biopsy was not performed.

His symptoms in the mid and late 1980s involving dyspnea and cough with chronic fever, anorexia and weight loss are common findings in beryllium toxicity. His presentation in December of 1988 with suspected sepsis along with variable chest x-ray findings in my opinion corresponds with a patient who has had an insidious onset of beryllium associated disease delayed by decades. It is my opinion based upon the history and clinical course during his last hospitalization that beryllium was causative of his pulmonary failure and ultimate death. As stated, no other etiologic pathogen/process was identified.

July 19, 2002 analysis of applicant's physician at 2.

The applicant previously had submitted an EEOICPA claim to the Department of Labor (DOL) contending that the worker's exposure to toxic materials in the workplace was a contributing factor to his final illness and death. On the basis of this physician's analysis and records obtained from the DOE, the DOL granted the applicant's claim. In a *Notice of Final Decision Following a Hearing* dated August 1, 2002 (the *DOL Final Decision*), the DOL concluded that the factual and medical evidence met the criteria for beryllium illness set forth at Section 73841(13)(B) of the EEOICPA. Specifically, the DOL found that the (i) the worker had over thirty five years of beryllium exposure at the DOE Oak Ridge facility; (ii) that the applicant's physician's interpretation of the worker's chest x-rays from December 1988 corresponds with beryllium abnormalities; (iii) that chemistry profiles performed during the worker's final hospitalization showed him to be hypoxic, meaning he had insufficient oxygenation of arterial blood and indicating a diffusing lung capacity defect; and (iv) the worker's final hospitalization is characterized by a clinical course consistent with a chronic respiratory disorder. *DOL Final Decision* at 3.

In its determination, the physician panel considered the medical information and the physician analysis concerning the worker's final illness. The panel acknowledged that the worker "worked as a welder and welder-inspector at the Y-12 plant in Oak Ridge from 1946 to

May 31, 1981, at which time he retired." However, the panel did not acknowledge that the applicant's husband had been exposed to beryllium, or that his final illness was consistent with beryllium disease. Specifically, it made the following findings:

1. Epidemiologic evidence of significant beryllium exposure.

None. 8/18/03 memo indicated no IH sampling data available.

2. Presence of beryllium in lung tissue, lymph nodes or urine.

No tests done.

3. Evidence of lower respiratory tract disease and a clinical course consistent with beryllium disease.

Uncertain.

4. Radiologic evidence of interstitial disease consistent with a fibronodular process.

Interstitial disease, yes, but not consistent with [chronic beryllium disease] as we read the chest x-ray reports.

5. Evidence of a restrictive or obstructive ventilatory defect or diminished carbon monoxide diffusing capacity.

The most recent Spirogram we could locate was dated 10/8/80. No evidence of either obstructive or restrictive disease.

6. Pathologic changes consistent with beryllium disease or examination of lung tissue and/or lymph nodes. . . .

[the worker's] terminal illness does not fit this criterion as we understand the records. In conclusion, we do not agree with [the applicant's physician], that is we cannot support a diagnosis of Chronic Beryllium Disease.

Panel Report at 3.

The OWA accepted the physician panel's determination. See March 3, 2003 Letter from the DOE to the applicant. Accordingly, the OWA determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the applicant contends that the physician panel determination is erroneous, and refers to a March 19, 2004 letter in which the applicant's physician objects to the conclusions reached by the Physician Panel. In that letter, the applicant's physician

asserts that "it is undisputed that [the worker] was environmentally exposed to beryllium in his work for DOE from the 1950's in his capacity as a welding inspector/engineer." He asserts that many of the symptoms experienced by the worker in the 1980's are consistent with chronic beryllium illness. He concludes:

Since chronic beryllium disease can manifest primarily as pneumonitis with exertional dyspnea, cough (often productive), chest pain, fevers, hemoptysis with malaise, anorexia, and weight loss and these signs and symptoms were all present in [the worker's] history over his last year, it is my opinion that the process which caused [his] death was beryllium related.

March 19, 2004 letter at 2.

II. Analysis

The Physician Panel Rule specifies what a physician panel must include in its determination. The panel must address each claimed illness, make a finding whether that illness arose out of and in the course of the worker's DOE employment, and state the basis for that finding. 10 C.F.R. § 852.12(a)(5). Although the rule does not specify the level of detail to be provided, the basis for the finding should indicate, in a manner appropriate to the specific case, that the panel considered the claimed exposures.

The panel determination addressed the applicant's claim that the worker suffered from chronic beryllium disease (CBD), and that CBD contributed to his death. The panel concluded that his terminal illness did not fit the criteria for CBD "as we understand the records." Panel Report at 3. However, we find that the panel's explanations of its evaluation of these criteria are not sufficient to explain its fundamental disagreements with the DOL's determination, based on the report of the applicant's physician, that the worker had CBD.

As noted above, the DOL determination finds that the worker had over thirty five years of beryllium exposure at the DOE Oak Ridge facility and therefore meets the key criterion of "occupational or environmental history, or epidemiologic evidence of beryllium exposure." *DOL Final Decision* at 2, quoting Section 73841(13)(b) of the EEOICPA. However, while the Panel Report acknowledges that the worker was employed as a welder and welder-inspector at the Y-12 Plant at Oak Ridge from 1946 to 1981, it makes no finding that he was exposed to significant amounts of beryllium. It appears to base this conclusion solely on the lack of IH sampling data available for

the worker. We believe that a further explanation is warranted if the panel is rejecting the occupational or environmental history of the worker as indicating significant beryllium exposure, especially when both the DOL and the applicant's physician accepted his work history as indicating significant beryllium exposure.

Similarly, the DOL accepted the finding of the applicant's physician that the worker evidenced a lower respiratory tract disease and a clinical course consistent with CBD. The panel rejects this conclusion on the grounds that this evidence is "uncertain." We believe that a more detailed explanation concerning the panel's independent analysis of the medical evidence is warranted where its conclusions are in disagreement with a physician's findings that have been accepted by the DOL. In this regard, the panel should consider the applicant's physician's assertion that the historical record for the worker documents symptoms consistent with CBD even where the contemporary diagnoses for these symptoms may have been inaccurate. See March 19, 2004 letter of applicant's physician at 1.

For the same reasons, we believe that the panel should explain the basis for its conclusion that the worker's chest x-ray reports are not consistent with a fibronodular disease process.

Based on the foregoing, the physician panel determination should be remanded for further consideration.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0068 be, and hereby is, granted as set forth in paragraph (2) below.
- (2) The application that is the subject of Case No. TIA-0068 is remanded to the Office of Worker Advocacy for further consideration consistent with this Decision and Order.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: June 2, 2004